IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFF,

VERSUS CIVIL ACTION NO. 4:92CV240-S-D

PLANTERS BANK & TRUST COMPANY, DEFENDANT.

MEMORANDUM OPINION GRANTING
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This cause is before the court on the motion of the plaintiff/counterdefendant for summary judgment or, in the alternative, partial summary judgment. USF&G filed this action as a declaratory judgment against Planters Bank concerning a claim made by Planters on a financial institution bond. Planters filed an answer and a counterclaim demanding judgment in the amount of $637,600.73, plus prejudgment interest, costs, and punitive damages in the amount of $3,000,000.00.

A. Standard of Review

On a motion for summary judgment, the court must ascertain whether there is a genuine issue of material fact. Fed. R. Civ. P. 56(c). This requires the court to evaluate "whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

The United States Supreme Court has stated that "this standard mirrors the standard for directed verdict...which is the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." Anderson, 477 U.S. at 250-51 (citation omitted). Further, the Court has noted that the "genuine issue" summary judgment standard is very similar to the "reasonable jury" directed verdict standard, the primary difference between the two being procedural, not substantive." Id. at 251. "In essence ...the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. Further, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252 (citation omitted).

In ruling on a motion for summary judgment, the court is not to make credibility determinations, weigh evidence, or draw from the facts legitimate inferences for the movant. Anderson, 477 U.S. at 255. Rather, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255. It should be pointed out, though, that if the " 'evidentiary facts are not disputed, a court in a nonjury

case may grant summary judgment if trial would not enhance its ability to draw inferences and conclusions.' " In re Placid Oil Co., 932 F.2d 394, 398 (5th Cir. 1991) (quoting Nunez v. Superior Oil Co., 572 F.2d 1119, 1124 (5th Cir. 1978). As the Placid court recognized, "[I]t makes little sense to forbid the judge from drawing inferences from the evidence submitted on summary judgment when the same judge will act as the trier of fact, unless those inferences involve issues of witness credibility or disputed material facts." Id. (emphasis added). Once a properly supported motion for summary judgment has been filed, it is incumbent upon the nonmovant to go beyond the pleadings and arguments of counsel in order to establish that there is a genuine issue of material fact for trial. See generally, Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis, 799 F.2d 218, 221-23 (5th Cir. 1986).

Facts

USF&G executed and delivered a Financial Institution Bond Standard Form 24 (bond number 32-0020-10674-91-1) on January 1, 1991, to Planters Bank. Said bond is designed to act as an insurance policy for certain losses incurred by Planters as explained within the language of the bond. The bond contains a single loss deductible of $50,000.00.

On May 19, 1992, Planters notified USF&G of a possible loss alleged to be covered by the bond. Subsequently, two proofs of

loss were submitted by Planters. The claims involved certain alleged forgeries and fraud committed by William C. Maloney. William C. Maloney, Jr., stole checks from the law firm trust account of Townsend, McWilliams and Holladay, and made forged deposits and negotiated forged trust account checks on the account. The check-kiting scheme involved the transfer of funds between the Townsend, McWilliams and Holladay trust account at Planters Bank, an account at the Sunburst Bank, and an account at the Bank of Ruleville. On September 23, 1992, USF&G denied Planters' claims. The total of the claims is $637,600.73.

Discussion

In the pertinent provisions of the bond, USF&G agreed to indemnify Planters for:

> ON PREMISES(B)(1) Loss of Property resulting directly from
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> (a) robbery, burglary, misplacement, mysterious unexplainable disappearance and damage thereto or destruction thereof, or
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> (b) theft, false pretenses, common-law or statutory larceny, committed by a person present in an office or on the premises of the Insured.
>
> while the Property is lodged or deposited within offices or premises located anywhere.
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> . . . .
>
> FORGERY OR ALTERATION
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> (D) Loss resulting directly from
>
> (1) Forgery or alteration of, on or in any Negotiable Instrument (except an Evidence of Debt), Acceptance, Withdrawal Order, receipt

> for the withdrawal of Property, Certificate of Deposit or Letter of Credit.
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> (2) transferring, paying or delivering any funds or Property or establishing any credit or giving any value on the faith of any written instructions or advice directed to the Insured and authorizing or acknowledging the transfer, payment, delivery or receipt of funds or Property, which instructions or advisers purport to have been signed or endorsed by any customer or the Insured or by any banking institution but which instructions or advices either bear a signature which is a Forgery or have been altered without the knowledge and consent of such customer or banking institution, Telegraphic, cable or teletype instructions or advice, as aforesaid, exclusive of transmissions of electronic funds transfer systems, sent by a person other than the said customer or banking institution purporting to send such instructions or advice shall be deemed to bear a signature which is a Forgery.

The loss incurred by Planters can be broken down into two separate categories. The first is made up of checks which were not honored by the Bank of Ruleville and Sunburst Bank. Two checks totaling $276,500.00, were refused by the Bank of Ruleville, and three checks in the amount of $94,500.00, $74,000.00, and $89,500.00 were returned by Sunburst. Planters maintains that the returned checks are covered by the "FORGERY OR ALTERATION" clause. The second category is $58,500.00 that was received in cash or cashier's checks by Maloney when he was negotiating forged stolen trust account checks. Planters argues that this second category of loss comes within the "ON PREMISES" provision, and thus, is covered by the bond.

Maloney deposited with the Bank of Ruleville two forged checks, in the amounts of $128,000.00 and $148,500.00, drawn from the Townsend, McWilliams & Holladay trust account at Planters. When the two checks were processed by Planters, it was discovered that they were forgeries. Planters refused to honor the checks since they were forgeries and the checks were returned to Ruleville. The Bank of Ruleville refused to accept the checks as properly returned items. The bond required Planters not to jeopardize USF&G's claim for indemnity from the Bank of Ruleville. After USF&G refused coverage, Planters initiated a lawsuit against the Bank of Ruleville for $276,500.00. Planters settled with the Bank of Ruleville for $189,250.00. Concerning this loss, it is Planters' position that its total loss should be offset by the settlement. USF&G maintains that Planters' alleged loss should be offset by the total loss attributed to the Bank of Ruleville checks, being $276,500.00.

On or about May 11 and 13, Maloney deposited into the trust account at Planters two checks for $89,000.00 and $94,000.00 from an account at Sunburst. Sunburst returned the checks for having been drawn on insufficient funds. On Friday, May 15, 1992, Carter Naugher, of Planters, called Sunburst in Grenada and was told that there were sufficient funds to cover the Sunburst checks. Mr. Naugher took the $89,500.00 and $94,500.00 checks to the

Sunburst branch in Moorhead and requested a cashier's check.[1] Instead, he was given an official check in the amount of $184,000.00. On May 18, 1992, Sunburst placed a stop-payment order on the official check. Planters asserts that Sunburst improperly denied payment of the official check, that the checks were finally paid, and that the bond was purchased from USF&G to cover just this sort of loss.

USF&G maintains that all of the categories of loss suffered by Planters come within an exclusion for funds which have not been finally paid. The pertinent exclusion contained in the bond provides:

> (o) loss resulting directly or indirectly from payments made or withdrawals from a depositor's account involving items of deposit which are not finally paid for any reason, including but not limited to Forgery or any other fraud, except when covered under Insuring Agreement (A);

Although exclusion (o) historically was designed to exclude coverage for loss incurred due to a check-kiting scheme, the unambiguous language does not limit the exclusion to that type of loss. See Mitsui Mfrs. Bank v. Federal Ins. Co., 795 F.2d 827, 831 (9th Cir. 1986). The burden is upon the plaintiff to prove that this exclusion is applicable. "[W]here an exclusion is specifically pleaded as an affirmative defense the burden of proving such affirmative defense is upon the insurer;..." Sunday

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[1]. A $74,000.00 check which the defendant is seeking to recover had not yet been returned to Planters.

v. Lititz Mut. Ins. Co., 276 So.2d 696, 698 (Miss. 1973); see Sentry Insurance v. Weber Company, Inc., 2 F.3d 554 (5th Cir. 1993) (citing Texas statute) ("The insurer, however, bears the burden of establishing that one of the policy's limitations or exclusions constitutes an avoidance or affirmative defense to coverage.").

Even though the categories of loss suffered by Planters revolve around Maloney's check-kiting scheme, the court cannot institutionally lump the two separate categories of transactions under exclusion (o). The first category, composed of the Bank of Ruleville and Sunburst checks, is certainly part of a check-kiting scheme and falls under exclusion (o). When Planters immediately credited the trust account with uncollected funds, exclusion (o) was initiated. The fact that Planters recovered a large portion of its loss from the Bank of Ruleville, or that Sunburst may have wrongfully placed a stop payment on the official check, does not prevent the first category of loss from coming within the language of exclusion (o). Planters acted contrary to its best interest by immediately crediting Maloney's deposits, instead of first ensuring that the checks were drawn on sufficient funds or not forgeries. This action was specifically excluded from coverage. No bond would be affordable if it provided coverage for such negligent acts. If Planters' allegation that the Bank of Ruleville and Sunburst have improperly denied final payment is correct, then redress is against the banks and not USF&G. The distinction being that the deposited

funds may be collectible from the Bank of Ruleville and Sunburst, but said funds had not been collected and thus were excluded from coverage by (o). See Mitsui Mfrs. Bank v. Federal Ins. Co., 795 F.2d at 831 (crediting checks to account and allowing subsequent withdrawal were proximate cause of loss). Accordingly, plaintiff's motion for summary judgment is granted as to the first category of loss.

The second category of loss, which is associated with the forged checks cashed or converted to cashier's checks by Maloney personally at the Planters Bank, would appear to be separate from the check-kiting scheme. Maloney did not deposit these items into an account to receive immediate credit upon which to kite checks. Instead, he simply cashed forged checks. USF&G argues that Planters did not suffer a loss by these transaction, since the Townsend, McWilliams and Holladay trust account had sufficient funds to cover the forged checks. The fact that the trust account legitimately had sufficient funds on deposit at the time Maloney cashed the forged checks indicates that exclusion (o) does not apply. Exclusion (o) is dependent upon an account being improperly credited with deposits that have not been collected from the payor bank. Additionally, the argument ignores that the checks were forgeries negotiated on the premises of Planters. On the facts before the court, the second category would be covered by the "ON PREMISES" clause and not excluded by (o). Accordingly, the

plaintiff's motion for summary judgment is not appropriate as to the second category of loss.

USF&G has moved alternatively for partial summary judgment on Planters' counterclaim for punitive damages. Punitive damages are designed to punish a party who has acted willfully or in gross disregard of another's rights. Punitive damages are designed to teach the wrongdoer and deter others from acting similarly. See generally Prosser, The Law of Torts § 2 (1971). The threat of punitive damages deters insurance companies, which would be otherwise unjustly enriched, from arbitrarily denying claims that rightfully should be paid. Punitives and other extra-contractual damages in actions for breach of contract are not ordinarily recoverable and are awarded only in extreme cases. See South Central Bell v. Epps, 509 So.2d 886, 892-93 (Miss. 1987). Since this case is nonjury, the court alone determines the applicable law and acts as the fact finder. USF&G's decision to deny coverage to Planters is certainly arguably reasonable. When USF&G denied coverage, no willful or malicious wrong was perpetrated. The court notes that this declaratory judgment was filed the day after notifying Planters that its claims were denied. It appears that every effort is being made to expeditiously conclude whether the loss incurred by Planters is covered by the bond. Punitive damages are simply not appropriate in this situation.

An order pursuant to this memorandum opinion shall be issued.

This _____ day of October, 1994.

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CHIEF JUDGE